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EXAMINER

PATTERSON, MARC A

ART UNIT

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9

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Offic Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/786,355	LINDENBERGER ET AL.	

  

<b>Examiner</b>	<b>Art Unit</b>
Marc A Patterson	1772

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### **Status**

1) Responsive to communication(s) filed on 29 November 2002.

2a) This action is **FINAL**.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### **Disposition of Claims**

4) Claim(s) 10-16 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 10-16 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### **Application Papers**

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.

    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.

    If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

#### **Priority under 35 U.S.C. §§ 119 and 120**

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

- Certified copies of the priority documents have been received.
- Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
- Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

#### **Attachment(s)**

1) Notice of References Cited (PTO-892)      4) Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)      5) Notice of Informal Patent Application (PTO-152)

3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_ .      6) Other: \_\_\_\_\_.

**DETAILED ACTION*****Election/Restrictions***

1. Newly submitted claims 17 – 18 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: the claims are directed, respectively, to a method of using and a method of making the originally claimed invention.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 17 – 18 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

**NEW REJECTIONS*****Claim Rejections - 35 USC § 112***

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claim 10 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The phrase 'sealable outlet connection piece' is indefinite, because its meaning is unclear. For purposes of examination, the phrase will be assumed to mean a piece of the shoulder to which a cap is screwed on. The phrase 'in the area of the face wall' is indefinite as its meaning is unclear. Claim 1 recites the limitation "one face wall and two side walls of the tube" in line 2. There is insufficient antecedent basis for this limitation in the claim. For purposes of examination, the tube will be assumed to have one face wall and two side walls.

***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 10 – 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Grunbacher et al (WO 96/19395).

With regard to Claim 10, Grunbacher et al disclose a toothpaste tube comprising a plastic film (page 1, lines 10 – 20), the tube having two side walls (folds which are sealed; page 5, lines 21 – 28); the tube comprises a shoulder piece (shoulder, which comprises a gusset panel, and which forms a face wall; page 4, lines 3 – 11) which is stiff compared to remainder of the tube (the V – shaped seals of the shoulder increase the structural rigidity of the tube; page 4, lines 3 – 11); the side walls are adhered to one another along two strip – shaped edge sections (page 5, lines 21 – 28; Figure 1) and one strip – shaped end edge section (the ends of the edge sections; page 5, lines 21 – 28; Figure 1); a cap is screwed to the shoulder (page 6, lines 19 – 29); and a flange which is attached to a face wall (the V – shaped seal of the gusset panel; page 4, lines 3 – 11); the film material comprises a 75 micron thick inner seal layer (page 4, lines 29 – 37; page 5, lines 1 – 5) and a 20 micron thick outside layer (page 4, lines 29 – 37; page 5, lines 1 – 5); the strip – shaped edge sections have a width greater than 4 mm (the width is 0.125 to 0.375 inches; page 6, lines 1 – 12); the inner boundaries of the two side edge sections face one another (the

tube is made from a web which is folded and sealed; page 5, lines 21 – 28) and are angled to the inside toward one another; the tube is tapered; page 4, lines 3 – 11).

Grunbacher et al fail to disclose edge sections having a width of at least 6.5% of the total width of the side wall. However, Grunbacher et al disclose edge sections having a width of 4 mm as discussed above. Therefore, the percentage of the total width would be readily determined through routine optimization by one having ordinary skill in the art depending on the desired end use of the product. It therefore would be obvious for one of ordinary skill in the art to vary the percentage of the total width, since the percentage of the total width would be readily determined through routine optimization by one having ordinary skill in the art depending on the desired end result as shown by Grunbacher et al. *In re Boesch and Slaney*, 205 USPQ 215 (CCPA 1980).

With regard to Claim 11, the flange of the shoulder piece at the edges of the face wall has two bent clips (V – shaped seals; page 4, lines 3 – 11) which join the side walls (V – shaped seals; page 4, lines 3 – 11).

With regard to Claim 12, the inner seal consists of polyethylene (page 4, lines 29 – 37; page 5, lines 1 – 5).

With regard to Claim 13, the outside layer consists of polyethylene terephthalate (page 4, lines 29 – 37; page 5, lines 1 – 5).

With regard to Claim 14, between the inner seal layer and outer layer there is a barrier layer (page 4, lines 29 – 37; page 5, lines 1 – 5).

6. Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Grunbacher et al (WO 96/19395) in view of Komiya et al (U.S. Patent No. 5,612,106).

Grunbacher et al disclose a toothpaste tube comprising a barrier layer as discussed above.

The thickness of the barrier layer is 10 microns (page 4, lines 29 – 37; page 5, lines 1 – 5);

Grunbacher et al fail to disclose a barrier layer comprising aluminum.

Komiya et al teach that it is well known in the art to use aluminum as a barrier layer of a toothpaste tube, for the purpose of preventing deterioration due to oxidation (column 1, lines 18 – 32).

It therefore would have been obvious for one of ordinary skill in the art at the time Applicant's invention was made to have provided for a barrier layer comprising aluminum in Grunbacher et al in order to prevent deterioration due to oxidation as taught by Komiya et al.

7. Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Grunbacher et al (WO 96/19395) in view of Holoubek et al (U.S. Patent No. 5,238,148).

Grunbacher et al disclose a toothpaste tube comprising a barrier layer as discussed above.

Grunbacher et al fail to disclose a barrier layer consisting of para – aramide.

Holoubek et al teach the use of polyamide (column 4, lines 13 – 26) as a barrier layer in a toothpaste tube, for the purpose of obtaining low gas permeability (column 4, lines 13 – 26).

It therefore would have been obvious for one of ordinary skill in the art at the time Applicant's invention was made to have provided for a barrier layer comprising polyamide in Grunbacher et al in order to obtain low gas permeability as taught by Holoubek et al.

With regard to the claimed aspect of the barrier layer consisting of 'para – aramide,' Holoubek et al teach the use of a polyamide as discussed above; the claimed aspect of the layer consisting of 'para – aramide' therefore reads on Holoubek et al.

## ANSWERS TO APPLICANT'S ARGUMENTS

8. Applicant's arguments regarding the 35 U.S.C. 112 second paragraph rejections of Claims 1 – 9, of record on page 2 of the previous Action, have been carefully considered but have not been found to be persuasive for the reasons set forth below.

Applicant argues, on page 1 of Paper No. 9, that the phrase 'in the area of the face wall' is not indefinite as there has to be an area of transition from the strip – shaped side end edge section to the face wall. However, no area of transition is claimed. Furthermore, it is not clear that an area of transition from the strip – shaped side end edge section to the face wall must exist, if the edge section and face wall are in direct contact.

The 35 U.S.C. 112 rejection of Claim 1 regarding the phrase 'sealable outlet connection piece' has not been addressed by Applicant. The rejection is therefore repeated above for newly submitted Claim 10.

Applicant's arguments regarding the 35 U.S.C. 103(a) rejection of Claims 10 – 14 as being unpatentable over Grunbacher et al (WO 96/19395), 35 U.S.C. 103(a) rejection of Claim 15 as being unpatentable over Grunbacher et al (WO 96/19395) in view of Komiya et al (U.S. Patent No. 5,612,106), 35 U.S.C. 103(a) rejection of Claim 16 as being unpatentable over Grunbacher et al (WO 96/19395) in view of Holoubek et al (U.S. Patent No. 5,238,148).

Applicant argues, on page 2, that Grunbacher et al do not disclose a shoulder piece comprising a stiffer material than the plastic material. However, a shoulder piece comprising a stiffer material than the plastic material is not claimed, as the claims are directed to a shoulder piece which is stiffer than the plastic film material; furthermore, as stated above, the gusset panel

Art Unit: 1772

which is disclosed by Grunbacher et al comprise V – shaped seals which are more rigid, and therefore stiffer, than the plastic material.

Applicant also argues, on page 4, that Grunbacher et al do not disclose a tube which stands upright, and that one of ordinary skill in the art would not be motivated to modify Grunbacher et al to provide a tube which stands upright. However, a tube which stands upright.

9. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Art Unit: 1772

***Conclusion***

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Marc Patterson, whose telephone number is (703) 305-3537. The examiner can normally be reached on Monday through Friday from 8:30 AM to 5:00 PM. If attempts to reach the examiner by phone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached at (703) 308-4251. FAX communications should be sent to (703) 872-9310. FAXs received after 4 P.M. will not be processed until the following business day.

Marc A. Patterson, PhD.

*Marc Patterson*  
Art Unit 1772

*Harold Pyon*  
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SUPERVISORY PATENT EXAMINER 2/20/03  
1772